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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT

KACHEMAK AREA COALITION, INC. )  
d/b/a CITIZENS CONCERNED ABOUT )  
ANNEXATION, et al., )

Appellants, )

STATE OF ALASKA LOCAL )  
BOUNDARY COMMISSION, and )  
CITY OF HOMER )

Appellees. )

CONSOLIDATED CASE NO. 3AN-02-04626 CI

**ORDER ON APPEAL OF LOCAL BOUNDARY COMMISSION DECISION**

**BACKGROUND**

**A. Facts**

The City of Homer ("City" or "Homer") is a first-class city. It was incorporated in 1964. Like many other Alaskan cities, its population and that of the surrounding area have steadily increased. Because of the growth in the outlying areas, the City decided to expand to incorporate some of those areas. It conducted an investigation as to the need and feasibility of annexing surrounding territory. On March 20, 2000, Homer submitted a petition to the Department of Community and Economic Development (DCED) to annex 25.64 square miles of land. This method of annexation, "legislative review annexation," is authorized under Article X, § 12 of the Alaska Constitution, AS 29.06.040(b) and AS 44.33.812(b)(2). The DCED formally accepted the petition for filing on March 29, 2000.

Official notification of the petition occurred between April 3 and April 17, 2000 through postings in the newspaper and in public places. Copies of the proposal were

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available at Homer City Hall and at the Homer Library. During this period, DCED staff met with various groups in the community to discuss annexation. On June 14 and August 24 DCED staff attended meetings on the annexation in Homer.

The deadline for filing responsive briefs to the annexation petition was June 5, 2000. By that date, the DCED received 14 responsive briefs and 168 letters, only 3 of which were favorable to the proposed annexation. On September 11, the City of Homer filed a reply brief to the responsive briefs and comments.

On April 27, 2000 a petition was submitted to Kenai Peninsula Borough requesting the formation of a service area (which included areas within Homer's proposed annexation). It is generally agreed that this petition was circulated as part of the effort to attempt to defeat annexation. On October 3, 2000, the populace living outside of Homer approved, through popular election, a proposal to establish the Kachemak Emergency Service Area ("KESA"). This service area covered approximately 200 square miles. Between January and June of 2001, the Kenai Peninsula Borough and the City of Homer entered into negotiations for the provision of fire protection services to the new service area. They entered into a 6-month contract under which Homer would provide fire services in KESA in exchange for \$106, 227.00.

Also during the spring of 2001 the state legislature enacted AS 29.35.450(c) (discussed in greater detail below), which mandates approval by a majority of municipal service area residents before a boundary to a service area is changed or the service area is abolished. This statute became effective on August 22, 2001.

On July 31, 2001, DCED staff conducted public informational meetings on the annexation proposal and made themselves available to answer the public's questions.

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The DCED completed its 412 page *Preliminary Report Regarding the City of Homer's Proposal for Annexation of an Estimated 25.64 Square Miles* on October 1, 2001. The Preliminary Report recommended that the annexation be limited to 3.3 square miles. By the November 6 deadline for comments on the Preliminary Report, the DCED had received comments from 32 individuals and groups.

Between November 8 and December 12, notice of public hearing was published in various public places in and around Homer. On November 21, DCED released its *Final Report*, increasing the recommended annexation area to 3.9 square miles. On December 14-15, the Local Boundary Commission (LBC), the Board that decides boundary issues, held a public hearing on the annexation petition. At the hearing, the City of Homer made opening and closing statements, but gave no testimony. Various respondents made statements and many concerned citizens supplied testimony. Immediately following the conclusion of the hearing, the LBC convened a decisional session for roughly two hours. The LBC amended the petition to reduce the territory to 4.58 square miles and approved annexation for that area. It released its formal statement of decision on December 26, 2001.

On January 17, 2002, the LBC held a meeting at which it considered requests for reconsideration of its decision. At the meeting, the LBC denied all the requests for reconsideration. The LBC then submitted its decision to the 23<sup>rd</sup> Legislature, which took no action on it. Thus, by operation of law, the Alaska Legislature tacitly approved the annexation of 4.58 square miles to the City of Homer.

**B. The Local Boundary Commission**

The Alaska Constitution, Art. X, § 12 establishes the LBC. The intention of this section was to provide an objective administrative body to make boundary decisions because,

Local political decisions do not usually create proper boundaries and that boundaries should be established at the state level. The advantage of the method proposed, in the words of the committee, 'lies in placing the process at a level where area-wide or state-wide needs can be taken into account. By placing authority in this third-party, arguments for and against boundary change can be analyzed objectively.'

Fairview Pub. Utility Dist. No. 1 v. City of Anchorage, 368 P.2d 540, 543 (Alaska 1962) (quoting Alaska Constitutional Convention Commentary on Proposed Article on Local Government, Dec. 19, 1955). To this end, the LBC has the power to consider proposed municipal boundary changes, amend the proposals, and either accept or reject those changes. AS 29.06.040.

**C. Local Election v. Legislative Review**

Art. X, § 12 of the Alaska Constitution establishes the Local Boundary Commission and sets out two methods by which local boundaries can be changed, Legislative Review and Local Action. Under the method of Local Action, the Constitution grants the LBC authority to establish procedures through which local boundary changes may be made. The LBC has created several procedures for local action that allow cities to annex land. These are codified at 3 AAC 110.150. Which procedure is used depends upon the type of territory proposed for annexation and its constituency.

The methods considered by the City of Homer were Legislative Review and an area wide election, established by 3 AAC 110.150(4).<sup>1</sup> Under the local action method, the question of annexation comes before both the residents of the annexing city and the residents of the area to be annexed in an election. The annexation passes if a majority of voters in both areas approve it. In an annexation by Legislative Review, the method chosen in this case, the City submits a proposal for annexation to the DCED. The LBC reviews the proposal and entertains public comments and hearings on the matter. If the LBC approves the proposal, it is sent to the Legislature. The Legislature then has 45 days to review and deny the petition. If both houses do not deny the petition, they tacitly approve the annexation.

#### **D. Procedural History**

The Local Boundary Commission produced its Statement of Decision on December 26, 2001. Both Kachemak Area Coalition (d/b/a Citizens Concerned About Annexation) (hereinafter CCAA) and Alaskans Opposed to Annexation (AOA) filed appeals of this decision. The appeals were consolidated into Superior Court Case No. 3AN-02-04626 Civil. Abigail Fuller joined the action as a co-appellant. During the pendency of this appeal, the Supreme Court held the City of Homer inappropriately withheld, certain documents related to the preparation of the annexation petition. See Fuller v. City of Homer, 75 P.3d 1059 (Alaska 2003). This Court ordered the parties to submit additional briefing on the effect of that decision on this case. This Court also

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<sup>1</sup> These methods are the ones recommended by the DCED for cases in which there is a strong public need for annexation, but much resistance on the part of the residents of the area to be annexed. See Annexation to a City Government on the DCED's Local Government On-line website, available at <http://www.dced.state.ak.us/cbd/LOGON/muni/muni-cityannex.htm>.

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allowed the parties to supplement their previous briefing in light of that ruling. Oral Argument on this appeal occurred on October 29, 2003.

#### STANDARD OF REVIEW

The appropriate standard of review is disputed in this case. Appellants claim that this Court should apply the substantial evidence test to the LBC's decision because the LBC used facts when reaching to its decision. CCAA's Brief p. 12, Fuller's Brief p. 6. Appellees argue that approval of a petition for annexation is a matter within the LBC's discretion and thus the Court should apply the reasonable basis test. State's Brief pp. 5-6, 9, City of Homer's Corrected Brief p.5.

The Appellees are correct that the appropriate standard of review in this case is the reasonable basis test. Local boundary decisions made by the LBC involve the formulation of fundamental policy. Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92, 98 (Alaska 1974); Keane v. Local Boundary Comm'n, 893 P.2d 1239, 1241 (Alaska 1995). The LBC employs "delegated legislative authority to reach basic policy decisions." Mobil Oil Corp. 518 P.2d at 99. Therefore, if this Court "perceives in the record a reasonable basis of support for the Commission's reading of the standards and its evaluation of the evidence," it should affirm the LBC's decision. Id. The LBC's decision in such matters will be overturned only if this Court finds the LBC abused its discretion. Port Valdez Co. v. City of Valdez, 522 P.2d 1147, 1151 (Alaska 1974).

If the statute does not implicate an agency's special expertise or determination of fundamental policies, the court may use its independent judgment. Keane, 893 P.2d at 1241. The Court will also apply this independent judgment to constitutional issues,

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which “should be given a reasonable and practical interpretation in accordance with common sense.” Id. at 1241-1242.

Here, the local boundary decisions made by the LBC involve the agency’s particular expertise and the formulation of fundamental policy. Therefore, reasonable basis is the appropriate standard of review for several of the issues on appeal. The decision to allow the participation of Commissioner Tesche did not involve particular expertise that is solely within the LBC’s realm of knowledge; thus, this Court will review that decision by using its independent judgment. The Court will also use this standard in considering whether the residents of KESA suffered a denial of their due process rights and whether the LBC properly considered the effect annexation would have on KESA.

#### DISCUSSION

##### A. Does AS 29.35.450 Require a Vote of the Residents of KESA?

The Appellants claim that AS 29.35.450(c)<sup>2</sup> required a vote of KESA’s residents approving the proposed boundary change before the annexation could be official.

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<sup>2</sup> AS 29.35.450 states,

Service areas. (a) A service area to provide special services in a borough or unified municipality may be established, operated, altered, or abolished by ordinance, subject to (c) of this section. Special services include services not provided by the unified municipality or a higher or different level of services. Special services include services not provided by a borough on an areawide or nonareawide basis in the borough or a higher or different level of services than that provided on an areawide or nonareawide basis. A borough may include a city in a service area if

(1) the city agrees by ordinance; or

(2) approval is granted by a majority of voters residing in the city, and by a majority of voters residing inside the boundaries of the proposed service area but outside of the city.

(b) A new service area may not be established if, consistent with the purposes of Alaska Const., art. X, the new service can be provided by an existing service area, by annexation to a city, or by incorporation as a city.

(c) If voters reside within a service area that provides road, fire protection, or parks and recreation services, abolishment of the service area is subject to approval by the majority of the voters residing in the service area who vote on the question. A service area that provides road, fire protection, or parks and recreation services in which voters reside may not be abolished and replaced by a larger service area unless that

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Because there was no such vote, the Appellants argue the annexation is invalid. In addition, they claim that because there was no vote, the residents of KESA experienced a denial of their due process rights. For the reasons set forth below, this Court finds these arguments unpersuasive.

### 1. The Authority of the Local Boundary Commission

As discussed above, the framers of the Constitution thought that local boundary decisions were better left in the hands of third parties and the state because local residents would not be objective. Thus, they gave the LBC broad powers in Art. X, § 12:

A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

This section of the Constitution establishes legislative review as the only named method of boundary change. Its preeminence is affirmed by AS 29.06.040, which states at subsection (d), "A boundary change effected under (a) and (b) of this section prevails over a boundary change initiated by local action, without regard to priority in time." If

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proposal is approved, separately, by a majority of the voters who vote on the question residing in the existing service area and by a majority of the voters who vote on the question residing in the area proposed to be included within the new service area but outside of the existing service area. A service area that provides road, fire protection, or parks and recreation services in which voters reside may not be altered or combined with another service area unless that proposal is approved, separately, by a majority of the voters who vote on the question and who reside in each of the service areas or in the area outside of service areas that is affected by the proposal. This subsection does not apply to a proposed change to a service area that provides fire protection services that would result in increasing the number of parcels of land in the service area or successor service area if the increase is no more than six percent and would add no more than 1,000 residents.

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the legislature intended for AS 29.35.450(c) to apply to legislative review, as the appellants contend, it could simply have amended AS 29.06.040 with a reference to AS 29.35.450(c),<sup>3</sup> which states,

(c) If voters reside within a service area that provides road, fire protection, or parks and recreation services, abolishment of the service area is subject to approval by the majority of the voters residing in the service area who vote on the question. A service area that provides road, fire protection, or parks and recreation services in which voters reside may not be abolished and replaced by a larger service area unless that proposal is approved, separately, by a majority of the voters who vote on the question residing in the existing service area and by a majority of the voters who vote on the question residing in the area proposed to be included within the new service area but outside of the existing service area. A service area that provides road, fire protection, or parks and recreation services in which voters reside may not be altered or combined with another service area unless that proposal is approved, separately, by a majority of the voters who vote on the question and who reside in each of the service areas or in the area outside of service areas that is affected by the proposal. This subsection does not apply to a proposed change to a service area that provides fire protection services that would result in increasing the number of parcels of land in the service area or successor service area if the increase is no more than six percent and would add no more than 1,000 residents.

Instead, the legislature left AS 29.06.040 intact with its explicit preference for annexations completed under the auspices of the LBC and legislative review.

An oft-mentioned principle of statutory construction is that all duly passed legislation is presumed to be constitutional. Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978); See also, State, Dep't of Revenue v. Andrade, 23 P.3d 58 (Alaska 2001). If the appellants are correct and AS 29.35.450(c) were to apply in situations such as the one at bar, it would usurp the constitutionally granted powers of the LBC. Thus, because this Court assumes AS 29.35.450(c) is constitutional, the statute cannot apply to annexations

<sup>3</sup> As the City of Homer suggests in n.20 of its Corrected Brief: The legislature, "could easily have done so by simple amendment, e.g., 'except when disapproved by the voters in an affected local service area as provided in AS 29.35.450(c).'"

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undertaken through legislative review. An in-depth reading of the statute and its legislative history also supports this conclusion.

## 2. The Plain Language of AS 29.35.450(c).

Statutory language should be reviewed in context. Keane v. Local Boundary Comm'n, 893 P.2d 1239, 1247 (Alaska 1995). This Court concludes AS 29.35.450(c) is not applicable to the present matter because of its plain language. The statute at issue here, ch. 31 SLA 2001, amended only AS 29.35.450, which concerns a municipality's control over its own service areas. As noted in the previous subsection, this statute does not concern legislative decisions to change municipal boundaries. The Court also notes that this statute is located within the section of statutes on Municipal Parties and Duties—not within the section on the Alteration of Municipalities and the Local Boundary Commission.

AS 29.35.450(a) plainly states, "A service area ...in a borough or unified municipality may be ... altered ... by ordinance, subject to (c) of this section" (emphasis added). Subsections are intended to modify each other and cannot be read in isolation. Because municipalities enact ordinances and not the LBC nor the legislature, the plain language of this statute suggests AS 29.35.450(c) is only applicable to boundary changes by local action. See AS 29, Chap. 25. The Homer Annexation occurred through legislative review, thus AS 29.35.450(c) does not affect it.

## 3. The Legislative History of AS 29.35.450(c)

The legislative committee minutes support the concept that it was municipal changes to service areas that the bill's sponsors were concerned with, not annexations

approved by the legislature. The minutes from the House Judiciary Committee hearing on February 5, 2001, are particularly enlightening:

REPRESENTATIVE CON BUNDE [sponsor of the bill] ... explained...Currently, there is some concern about a 'tyranny of the majority;' that local areas ... aren't able to maintain their level of service if the surrounding area chooses to vote them out of existence. ... [I]f both the surrounding area and the affected area agree, then reaching a majority vote would not be a problem. However, if the local [affected] area objected to proposals, it should not be subject to them simply because the surrounding areas voted in favor of the proposals.

...

REPRESENTATIVE BUNDE explained that his motivation for bringing this issue before the committee was to maintain flexibility and preserve the right of the individual faced with manipulation by voters outside his or her service area. ...[H]e did not want his local road service areas to be changed or absorbed into the municipality, i.e., voted out of existence without a majority vote of the people both inside the affected service areas and the surrounding areas.

...

WILLIAM A. GREENE, Municipal Attorney, Municipality of Anchorage ...Further, [the proposed CS] violates Article X, Section 5, of the Alaska State Constitution in that it impairs or impedes the annexation of an area into the city or another service area. ...

...

MICHAEL GATTI, Borough Attorney, Matanuska-Susitna Borough, ... mentioned that nothing in the proposed CS would preclude attempts of annexation in the Knik/Fairview area, because it is the local boundary commission that governs annexation procedures. ...

...

OCIE ADAMS ...asked whether or not the proposed CS would, by requiring a vote of the people, preclude the Anchorage Borough from annexing a portion of the Knik road service area.

...

CHAIR ROKEBERG pointed out [in response to Mr. Adams] that this particular situation appeared to be an annexation/boundary issue and was not germane to the topic of service areas.

22<sup>nd</sup> Alaska State Legislature, House Judiciary Committee, Minutes, "HB 13 – Service Areas: Voter Approval/ Tax Zones," (February 5, 2001) (emphasis added).

Indeed, throughout this statute's entire legislative history, not just the Feb. 5 minutes, there are numerous comments addressing the fact that this bill focuses on municipal boundary changes and aims at preventing the electorate of one area from voting to alter a service area without any input from the residents of that service area. It was outside the scope of the legislative discussion to argue, as appellants do now, that this statute could impact annexations approved by legislative review.<sup>4</sup> Accordingly, even if such an interpretation was constitutional, there is no evidence (not the plain language nor legislative history) from which this Court could conclude that AS 29.35.450(c) mandates a vote of KESA residents.

**B.**

**Were the Residents of KESA Denied Due Process  
Because There Was No Vote?**

Appellants claim that because the residents of Homer and the annexed area were not given the opportunity to vote on the proposal, they experienced a denial of their due process rights. Fuller's Brief p. 26. They also claim the citizens affected by the annexation were denied due process because there was never an opportunity for public comment on the final annexation of 4.58 square miles. CCAA's Brief p.36.

"As a threshold matter, due process rights are only implicated by a deprivation of liberty or property interests." Nickerson v. University of Alaska, 975 P.2d 46, 53 (Alaska

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<sup>4</sup> The only time Homer's situation was ever referred to throughout this deliberation was in the testimony given by Abigail Fuller and Sallie Dodd-Butters in their capacities as citizens and members of CCAA. Neither asserted any professional expertise on the subject matter. Although citizen comment and participation is essential to the republican process, citizens' opinions do not and should not reflect the legislature's intent, especially when that imputed intent would be unconstitutional.

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1999). Municipal annexations without a vote of the electorate do not in any way affect life, liberty, or property rights; nor do they deny any person due process of law:

Appellants do not point out, nor do we perceive, in what respect there has been a deprivation of 'liberty, or property, without due process of law.' The determination of what portions of a state shall be within the limits of a city involves an aspect of the broad political power of the state which has always been considered a most usual and ordinary subject of legislation. ... Those who reside or own property in the area to be annexed have no vested right to insist that annexation take place only with their consent. The subject of expansion of municipal boundaries is legitimately the concern of the state as a whole, and not just that of the local community. There has been no infringement or deprivation of rights protected by the Fourteenth Amendment.

Fairview Public Util. Dist. No. 1 v. City of Anchorage, 368 P.2d 540 (Alaska 1962).

(Holding that the annexation of a public utility district, if done in a constitutional manner, did not require a vote of the district's residents.)

The U.S. Supreme Court has also interpreted due process rights in such a fashion. In a case where a taxpayer claimed that the taxes assessed by the city, into which his land had recently been annexed by the state legislature without his vote, deprived him of his property without due process of law, the court stated,

What portion of a State shall be within the limits of a city and be governed by its authorities and its laws has always been considered to be a proper subject of legislation. ... Whether territory shall be governed for local purposes by a county, a city, or a township organization, is one of the most usual and ordinary subjects of State legislation.

Kelly v. City of Pittsburgh, 104 U.S. 78, 80-81 (1881). The Court further explained,

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. ... The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. ... The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, ... unrestrained by any provision of the Constitution of the United States.

Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907).

Appellants attempt to distinguish Fairview by noting that the Fairview court dealt with the assets and liabilities of the defunct Utility District, not the increased taxation the new residents of Homer face. Fuller's Reply p. 10. Ms. Fuller also asserts that annexation is of deep, personal interest to the people who are being annexed and thus deserves due process consideration. Id.

This distinction is misplaced. Nowhere does any court declare that residents of an annexed area necessarily have interests that must be protected to the extent Appellants propose. The DCED and LBC afforded many opportunities for the public to comment, respond, and testify about the annexation. The record before the court of public participation is impressive. An elevated legal interest does not attach merely because a person has a strong interest to a particular issue. The courts are quite clear that the boundaries of municipal governments are state issues. Local residents do not have sufficient legal interests in these matters to necessitate an elevated level of due process. Thus, in addition to there being no statutory requirement for a vote of KESA's residents, there is no equal protection requirement for such a vote.

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The second denial of due process claim the Appellants raise is that there was no opportunity for public comment on the final 4.58 square miles approved for annexation. Legislative proceedings require less due process than adjudicative proceedings. Property Owners Ass'n v. City of Ketchikan, 781 P.2d 567, 571 (Alaska 1989). Such proceedings (compared to adjudicatory proceedings) require notice and the opportunity to be heard. Id. at 572. As stated above, the public was given much opportunity to comment and be heard on the annexation petition. The original petition requested annexation of 25.64 square miles, the public was duly noticed and commented on that petition in their written responses and at the Dec. 14-15 hearing. The DCED recommended 3.3 square miles, the public commented on that recommendation at the hearing as well. The public thus had the opportunity to comment on areas both larger and smaller than the area finally approved for annexation. The public suffered no denial of its due process rights as a result of this process.

**C. Was it Improper Not to Recuse Commissioner Tesche  
Because of an Alleged Conflict of Interest?**

Alan Tesche served on the LBC during its review of Homer's Petition and subsequently voted in favor of the amended Petition. Tesche also provided legal services to the City of Homer during the time the City was preparing its Petition. In November 1999, he represented the City's Planning Commission in an appeal before the City's Board of Adjustment, relating to a city zoning ordinance with respect to the non-conforming uses of commercial property. This appeal was the conclusion of work begun in 1998. Tr. 6/27/00 p.5. That work concluded on January 28, 2000. A partner of

Tesche also did some paperwork for the City in November 1999, for which the City compensated their firm \$371.00 on December 30, 1999.

The City passed a resolution to initiate the petition process on Dec. 13, 1999, roughly one month after Tesche began his work for the City in 1999. The City filed its Petition on March 20, 2000. Tr. 6/27/00 p.5.

Appellants claim Tesche's participation was in error because of his conflict of interest. They argue Tesche should not have been allowed to participate in the decision because of the nature of the services he performed for Homer in the past and is likely to perform in the future.

In Carney v. State Bd. Of Fisheries, 785 P.2d 544 (Alaska 1990), the Supreme Court found that the focus of the common law bar on conflicts of interest "appears to be on the relationship between the public official's financial interest and the possible result of the official's action, regardless of the official's intent." Id. at 548. (Holding that the varying financial interests of Board of Fisheries members disqualified them from the decision-making process concerning subjects in which they had particular interest.)

The court in Griswold v. City of Homer also noted that appearances of impropriety should be avoided in situations regarding potential conflicts of interest. 925 P.2d 1015, 1029 (Alaska 1996). See also, Stahaker v. Williams, 960 P.2d 590, 596 (Alaska 1998). The Griswold court set out the policy to be followed in determining the effect of a conflicted vote:

Initially, the court must determine whether a member with a disqualifying interest cast the decisive vote. If so, the ordinance must be invalidated. If the ordinance would have passed without the vote of the conflicted member, the court should examine the following three facts: (1) whether the member disclosed the interest or the other council members were fully

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aware of it; (2) the extent of the member's participation in the decision; and (3) the magnitude of the member's interest.

Griswold 925 P.2d at 1029.

Four commissioners voted in favor of the amended Homer annexation proposal (the fifth commission seat was vacant at the time of the decision). Only 3 commissioners needed to vote in favor of the annexation for it to pass. Thus, Tesche did not make the deciding vote. His potential conflict therefore passes the first part of the Griswold test.

Tesche brought the potential conflict of interest to the attention of the LBC in a letter dated June 19, 2000. At a hearing on June 27, 2000, the remaining members of the LBC examined Tesche's potential conflict under both the Executive Branch Ethics Act and the Commission's bylaws and found no conflict worthy of removing Tesche from participating in the review of the Homer petition. See Tr. State of Alaska, Local Boundary Commission Meeting of June 27, 2000. At this meeting, the remaining members of the Commission voted unanimously to allow Tesche to participate in the process of reviewing Homer's annexation petition. Id. p.11. The record does not reflect that Tesche had a greater role in the discussion and decision to approve the amended proposal than any other commissioner. Tesche did not provide legal services to Homer in conjunction with the annexation proposal, rather his work centered on an administrative appeal related to zoning ordinances. All work was completed and paid for by the end of January 2000. Id. at 6. Homer submitted its annexation proposal in March. The charge for the work totaled roughly \$4000.00. Id. at 5,6. This is not a seemingly significant amount when taken in context with the whole of Tesche's business. Thus, under both

Griswold and Carney, even though Tesche received compensation from the City for his services, his participation in the annexation process was proper.

**D. Does the Supreme Court's Decision in Fuller v. City of Homer Affect this Appeal?**

While this case was awaiting oral arguments, the Supreme Court decided Fuller v. City of Homer, 75 P.3d 1059 (Alaska 2003). The Court held the City was remiss in withholding, by claiming the deliberative process privilege, certain documents related to its preparation of the annexation petition at issue in this case. In response to the Fuller decision, this Court ordered the parties to file supplemental briefs explaining Fuller's effect and any additional documents necessary to complete the record in light of this decision.

In their briefing, the Appellants claim that in light of this ruling, the City's refusal to produce these documents constituted reversible error, or at the least required a de novo review of the withheld documents. CCAA's Response to Fuller v. City of Homer Brief p.3, See also, Fuller's Response to Fuller v. City of Homer Brief p. 3, AOA's Response to Fuller v. City of Homer Brief p.2. If the withholding of these documents constituted a procedural error resulting in injustice, the Court must remand the annexation to the LBC. Port of Valdez, 522 P.2d 1147, 1155 (Alaska 1974).

After reviewing these documents and the accompanying briefs, this Court finds that there was no error that would require a reversal of the annexation. The withheld documents were primarily department head memos. These memos contained information and numbers that were presented in a finalized version to the LBC. The differences

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between the withheld department head memos and the documents submitted to the LBC as evidence are not significant. In approving an annexation petition, the LBC must find that, "the economy within the proposed boundaries of the city include the human and financial resources necessary to provide essential city services on an efficient, cost-effective level." 3 AAC 110.110. These documents take nothing away from the LBC's finding. Further, this court, having reviewed these documents *de novo* finds no injustice was caused by their omission that would require a remand.

**E. The Annexation's Impact on KESA**

Appellants' most troubling contention is that the LBC failed to consider the impact the annexation would have on the remaining territory of KESA. They contend that Homer essentially "cherry-picked" KESA. The annexation took a large percentage of KESA's population but left a majority of its territory—over 175 square miles. Thus, KESA was left in a predicament in which it had a greatly reduced tax-base yet remained almost the same size as before the annexation. The Appellants argue that the LBC should have considered the impact annexation would have on KESA before it approved the annexation. AOA's Brief pp. 5-6, Fuller's Brief p. 15, CCAA's Brief pp. 25-26.

Appellants rely on Keane v. Local Boundary Commission, where the Alaska Supreme Court held that when, "a decisional document shows on its face that an important factor was not considered, the court should remand the matter for further consideration." 893 P.2d 1239, 1245 (Alaska 1995). In Keane, the matter before the LBC was the attempted incorporation of Pilot Point into a city. One of the applicable regulations governing the LBC's decision required the LBC to consider the

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reasonableness and practicability of whether services could be adequately performed by the borough.

While the Keane court acknowledged that the LBC was not required to set forth specific findings of fact, it could not ascertain from the record whether the LBC made either a reasonableness or practicability determination of whether a service area was needed. Thus, using its independent judgment, the Court remanded the case to the LBC to make such a determination. Id. at 1245- 1246.

Appellees in the present case admit to essentially dismissing any impact the Homer annexation would have on KESA, yet at the same time they claim the issue was discussed as much as the situation warranted. State's Brief p. 19-20, Homer's Corrected Brief p. 31. The stated reason for the inattention is that the LBC and Homer maintain that KESA was formed illegally and thus did not deserve serious consideration. Homer's Corrected Brief p.31.<sup>5</sup> Regardless of the motives of those who petitioned to form KESA, KESA was created and will continue to exist even if Homer annexes a portion of it. This court must assume that the remaining service area is legitimate and will be responsible after annexation for providing services within its new boundaries.

The City and the LBC are correct that there is much mention of KESA within both the DCED's Preliminary and Final Reports as well as the whole record. However, that is all there is- mention of KESA. There is no indication any discussion took place regarding the impact annexation would have on the remainder of KESA. Additionally,

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<sup>5</sup> See Alaska Constitution Art. X, §5 stating "[a] new service area shall not be established if, consistent with the purposes of this article, the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city." The Appellees contend that because annexation was possible, formation of the service area was improper.

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this issue was raised on reconsideration before the LBC, but the LBC dismissed these claims, again without discussion. See R. 3414, 3417, Tr. 1/17/02 p.7-8.

Here, the original Homer petition never focused on the effect annexation would have on KESA because KESA was not formed when the City submitted its petition. However, KESA existed when the DCED wrote its Preliminary Report. Thus, it was within the realm of the LBC's consideration of the annexation.

While 3 AAC 110.900(d) does not, contrary to Appellant's contention, require transition agreements be in place before an annexation petition is approved, this directive, like all similar regulations, is made with the purpose of enacting the mission of the LBC. "By placing authority in this third-party, arguments for and against boundary change can be analyzed objectively." Fairview 368 P.2d at 543. It is for this reason the framers of the Alaska constitution created the LBC and for this reason that all boundary changes approved by the LBC must be in the "best interests of the state." AS 29.06.040(a).

This Court accepts as true that Homer and the Kenai Peninsula Borough agreed to an amicable transfer of assets. See Testimony of Collette Thompson, Attorney for Kenai Peninsula Borough, Tr. 12/14/01 pp. 53, 56. However, given the amount of attention focused on KESA from even before its inception, this Court finds the lack of consideration given to the effect annexation would have on KESA troubling. Mentioning KESA in passing, or in connection with the additional burdens the City planned to take on is not the same as a discussion about the impact annexation would have in view of whether the annexation was in the best interests of the state. Clearly, annexation of the entire service area was not in the state's best interests, as the LBC did not approve even the entire 25+ square miles for which Homer originally petitioned.

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Because it was impossible for the City to include a transition plan for KESA at the time of its petition (since it did not yet exist), a discussion of the effect annexation would have on surrounding services areas, was warranted to ensure that the annexation was indeed in the best interests of the state. There is no evidence that any such discussion ever occurred. Thus, a remand is appropriate to ensure that the LBC considers this issue.

### CONCLUSION

For the reasons stated above, AS 29.35.450(c) does not apply to the Homer annexation and thus, no vote of KESA's residents was required. Because there was no requirement for a vote to approve the annexation and because the residents of KESA and Homer were given the opportunity to comment on the proposed annexation, there was no denial of the right to due process. The Commission did not err when it allowed Commissioner Tesche to be a part of the annexation proceedings. A review of the documents shared as a result of the Supreme Court's recent decision in Fuller v. City of Homer did not indicate any omission of evidence requiring a remand. However, the LBC erred when it failed to consider the impact annexation would have on KESA.

For the reasons expressed in this opinion, Homer's amended annexation petition is REMANDED to the Local Boundary Commission to discuss the impact of annexation on KESA. All other aspects of the LBC's decision are AFFIRMED.

DATED this 4<sup>th</sup> day of December 2003, in Anchorage, Alaska.



Mark Rindner  
Superior Court Judge

I certify that on December 5, 2003  
of the above was mailed to each of the following at  
their addresses of record:

Fuller Vardor Erwin Tans  
Chandler

Omaha  
Administrative Assistant